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SUPREME COURT, U.S.

No. 99-808

IN THE

Supreme Court of the United States

LANCE E. FARR,

Petitioner,

v.

NC MACHINERY CO., a Washington corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petitioner accurately lists the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

Respondent NC Machinery Co., d/b/a Tractor & Equipment, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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29 C.F.R. § 1915.116(j) 6

Rule:

United States Supreme Court Rule 10 1

STATEMENT OF JURISDICTION

According to Rule 10 of the Rules of the Supreme Court of the United States, "A petition for a writ of certiorari will only be granted for compelling reasons." Although there may be a conflict within the circuits on the issue that Petitioner seeks certiorari, the facts and legal status of this case do not warrant the Court granting certiorari.

STATEMENT OF THE CASE

Petitioner seeks to create an issue for review by this Court which is not properly presented by the decision of the District Court or the Ninth Circuit Court of Appeals. Petitioner states that it is seeking review of the Ninth Circuit's decision which held that NC Machinery Co. (NC) cannot be held negligent per se for violation of safety regulations promulgated pursuant to the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-700. However, Petitioner ignores the fact that the District Court specifically held:

> 5. Plaintiff [Petitioner] failed to prove by a preponderance of the evidence that defendant [Respondent NC] violated any safety statutes or regulations. Assuming, without deciding, that the Shipyard Industry Standards, 29 C.F.R. § 1915 et seq., apply in this case, the only regulation violated was by Captain Farr when he stepped to the bottom of the ladder immediately adjacent to the engine block. 29 C.F.R. § 1915.116(j).

Petition, A-14-15, Conclusion of Law 5, Findings of Fact and Conclusions of Law, District Court. In addition, the District Court found:

> 12. The use of a lifting link with a ½ inch bolt in one of the center holes is the standard method used to raise engine blocks. The lifting link is listed in the Caterpillar manual for use in lifting up to 4000 lbs. NC's mechanic did not violate any safety statutes or regulations in using the lifting eye in this manner.

Petition, A-12, Finding of Fact 12, Findings of Fact and Conclusions of Law, District Court. The District Court clearly found that Petitioner had not proved (factually or legally) any violation of an OSHA safety statute or regulation. Therefore, this Court should not grant certiorari to decide an issue that is not relevant in the present case. For negligence per se to apply, there must first be a violation of a safety statute or regulation and the injured party must be in the class intended to be protected by the safety statute or regulation. *See Teal v. E.I. DuPont De Nemour and Co.*, 728 F.2d 799 (6th Cir. 1984). Petitioner seeks to have this Court decide whether he is in the class intended to be protected, but ignores the fact that the District Court held that Petitioner had not proven any violation of a safety regulation or statute by NC.

A. Factual Background

To understand this matter, a brief summary of the undisputed facts of the case is necessary. Petitioner is the managing owner and master of the F/V KEVLEEN K. In the fall of 1994, on a voyage from Seattle to Alaska, one of the auxiliary engines on the vessel failed. When the vessel arrived in Dutch Harbor, the crab fishing season was about to start and it was important that the auxiliary engine be fixed as soon as possible. Captain Farr immediately contacted

respondent NC's office in Dutch Harbor and arranged for a mechanic to inspect the engine. NC's mechanic determined that the engine had to be rebuilt or replaced.

NC's mechanic informed Captain Farr that a replacement engine was available in Dutch Harbor. Captain Farr then decided to replace the engine with the new engine. Even after making this decision, Captain Farr was under extreme pressure to get the new engine installed as quickly as possible in order to make the upcoming crab season. Instead of waiting for NC to bring in mechanics to do all the work, Captain Farr elected to have the vessel's crew do most of the labor involved in removing the old engine and installing the new engine. NC's mechanic would assist, hook up the new engine to the generator and check it out. NC's mechanic worked with Captain Farr and his chief engineer in rigging the engine from the engine room using chain come-alongs to lift the engine up the ladder way.

When the engine was at the bottom of the ladder, NC's mechanic attached a lifting link to the front of the engine using a ½ inch bolt. Two come-alongs were attached to the engine. One was lifting the front of the engine and was attached to a lifting eye in the overhead at the top of the ladder. The other was attached at the back of the engine and to the overhead in the engine room to keep the engine away from the ladder as it went up. Captain Farr's chief engineer went to the top of the ladder to operate that come-along while Captain Farr remained in the engine room operating the other come-along to hold the engine off the ladder.

When it was clear that the engine would make it up the ladder, NC's mechanic went to pick up his tools. After he left the area, for some reason Captain Farr stepped in under

the engine block while it was being raised up the ladder way. At this point, the bolt holding the lifting link in the engine block pulled out and the engine fell striking and injuring Captain Farr.

At the trial, experts testified for both sides as to why the lifting bolt pulled out, whether the use of a single lifting point was proper, and whether the use of the lifting link met OSHA Shipyard Industry Standards. 29 C.F.R. § 1915 *et seq*. OSHA standards generally require a safety factor of five. *See, e.g.*, 29 C.F.R. §§ 1915.112, 1915.113 *et seq*. Whether the use of the lifting link met this standard was very contested in the trial. As stated above, the trial judge found that the use of the lifting link (as recommended by the engine manufacturer) did not violate any safety statutes or regulations.

REASONS FOR DENYING THE WRIT

Petitioner seeks review by this Court solely of the issue whether negligence per se applies to this case because of an alleged violation of OSHA safety statutes or regulations by NC. In order for negligence per se to apply, however, there must first be a violation of a safety regulation or statute, something the District Court specifically found Petitioner had not proved. Petitioner ignores this fact and simply assumes that there was a violation and then argues that he was in the class intended to be protected by the OSHA regulations.

The District Court was reluctant to find that the OSHA regulations even applied in this case for several reasons, not simply because Captain Farr was not an employee of NC. Firstly, Captain Farr was not only the master of the vessel,

he was also the managing owner. The chief engineer and other crew members of the vessel were his employees.

Secondly, the regulations for Shipyard Industry Standards do not apply to "the master, ship's officer, crew members, design, construction and maintenance of the vessel, its gear and equipment. . . ." 29 C.F.R. § 1915.2. The definition of "employee" in the OSHA shipyard industry regulations specifically excludes the master, ship's officers, and crew of the vessel. 29 C.F.R. § 1915.4(d).

Thirdly, it was not clear who was in charge of this operation. Petitioner, of course, claimed that NC was totally in charge of the operation, while it was NC's position that its mechanic was simply assisting Captain Farr in the removal of the old engine. The District Court found that: "The actions of the parties show that plaintiff [Petitioner], the vessel's crew, and defendant's [NC] mechanic were working together to remove the old engine when the accident occurred." Petition, A-12, Finding of Fact 7, Findings of Fact and Conclusions of Law, District Court.

In its decision, the District Court assumed that the OSHA Shipyard Industry Standards applied, but concluded that Petitioner had not proven that NC violated any regulation or statute. The District Court did not decide that the regulations did not apply solely because Captain Farr was not an employee of NC. The District Court assumed that even if the regulations did apply, Petitioner failed to prove a violation of the regulations. Therefore, negligence per se could not apply because there is no violation of a safety regulation or statute by NC. This Court, therefore, should not grant the petition to review an issue that is not properly presented by this case.

The Ninth Circuit's decision focused on superseding cause, not the alleged OSHA violations or negligence per se. In a brief paragraph, the Ninth Circuit denied Petitioner's argument that negligence per se should be applied because of an alleged violation of OSHA regulations based on the fact that Captain Farr was not an employee of NC. The Ninth Circuit could have simply stated Petitioner had not proven a violation of a safety regulation or statute so as to impose negligence per se.

Petitioner now seeks Certiorari on the grounds that there is a conflict in the Circuits as to whether the specific duty to comply with OSHA regulations, 29 U.S.C. § 654(a)(2), extends to non-employees. Although there may be a conflict among the Circuits as to whether OSHA has jurisdiction to issue fines and penalties to a company when the only persons endangered by a violation are non-employees, the issue is not presented properly by this case. However, there is not necessarily a conflict in the Circuits on the issue of negligence per se in cases involving violation of OSHA regulations and non-employees.

Petitioner seeks not simply to have this Court hold that the class protected by OSHA regulations includes non-employees, but rather to hold that a violation of a safety regulation results in negligence per se in instances where a non-employee is injured. As pointed out above, the District Court held that Petitioner failed to prove any violation of an OSHA statute or regulation by NC. The District Court specifically held that "the only regulation violated was by Captain Farr when he stepped to the bottom of the ladder immediately adjacent to the engine block." Petition, A-12, Conclusion of Law 5, Findings of Fact and Conclusions of Law, District Court (citing 29 C.F.R. § 1915.116(j)).

Captain Farr was not simply an employee of another contractor working on the vessel. He was the master and the managing owner of the vessel. The chief engineer working the come-along at the top of the ladder was his employee. Technically, Petitioner was the other employer working in the area. He now wants this Court to decide not simply whether non-employees are in the protected class of the OSHA safety regulations, but whether he, as the managing owner of the vessel, is entitled to protection. As cited above, the OSHA regulations do not extend to the master or crew members. 29 C.F.R. § 1915.4(d). Had Petitioner's employee (the chief engineer) been injured in this accident, Petitioner would clearly have argued that OSHA safety statutes and regulations did not extend to him as an employer. The OSHA safety regulations were obviously considered by the District Court as setting a standard of care owed by Petitioner when he stepped in under the engine block.

In this case, because the District Court held that Petitioner had not proven any violation of a safety statute or regulation by NC, but rather Petitioner violated safety standards by stepping in under a heavy load, any discussion by this Court of negligence per se would simply be dicta. The findings and conclusions of the District Court eliminate the need for any further discussion of negligence per se.

With two exceptions, the cases cited by Petitioner involve actions for fines or penalties and do not involve the issue of imposing negligence per se liability on a non-employer. In *Teal v. E.I. DuPont De Nemour and Co.*, 728 F.2d 799 (6th Cir. 1984), the Sixth Circuit held that the specific duty to comply with OSHA regulations, 29 U.S.C. § 654(a)(2), extends to employees of an independent contractor in the work area. However, in *Teal*, the parties

stipulated that there was a violation of a OSHA regulation by the defendant and that the plaintiff was injured by the breach of the duty established by the regulation. In this case, the District Court held that Petitioner had not proven any violation of a safety statute or regulation by NC. The Court cannot impose negligence per se without first finding a breach of a safety regulation or statute by NC. Because the District Court found that Petitioner had not proven any violation, the Ninth Circuit did not have to, and this Court should not, rule on the application of negligence per se in this case.

In *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981), the Fifth Circuit upheld the trial court's decision that the defendant was not negligent. The plaintiff, in *Melerine*, argued that negligence per se should be applied to hold the defendant at fault. However, the lower court found that the only negligence was on the part of the plaintiff (similar to the findings in this case). The Fifth Circuit held that the class protected by OSHA regulations comprises only employers' own employees. However, The Fifth Circuit stated: "Even if this regulation were applicable, it would be useless to Melerine in his attempt to establish negligence per se; for its violation was patently not the cause in fact nor, a fortiori, the proximate cause of Melerine's injury." *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 713 (5th Cir. 1981). Similarly, in this matter, even if the Court were to grant Certiorari, any discussion of negligence per se because of a violation of an OSHA safety regulation would be meaningless because the District Court held that Petitioner had not proven any such violation.

CONCLUSION

There is no reason, let alone any compelling reason, for the Court to accept this case for review based on the issue of whether the specific duty to comply with OSHA safety regulations extends to non-employees at the work site. This case simply does not present the issue properly for the Court's review. The District Court specifically held that Petitioner had not proven a violation of any safety statute or regulation. The Ninth Circuit reversed solely on the issue of superseding cause. With respect to this issue, the Ninth Circuit simply stated that Petitioner does not need the application of negligence per se or *res ipsa loquitur* to prove that NC was somehow negligent. The Ninth Circuit did not disturb the District Court's findings that Petitioner had not proven a violation of a safety regulation or statute or that the only safety regulation violated was by Petitioner when he stepped in under the engine block.

This case does not justify further review by this Court. For the reasons stated above, the petition should be denied.

Respectfully submitted,

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